

Memorandum

To : Dennis P. Maciel
Environmental Fees Section

Date: December 17, 1992

From : Janet Vining
Tax Counsel

Subject: **Applicability of the Underground Storage Tank Fee on Indian Reservations**

I am writing in response to your August 18, 1992 memorandum, requesting a legal opinion concerning the applicability of the Underground Storage Tank Fee imposed in Health and Safety Code Section 25299.41 to the owner of an underground storage tank who operates a service station on an Indian reservation. I apologize for the delay in responding to your request.

For the reasons stated below, I conclude that the Underground Storage Tank Fee does not apply to underground storage tanks located on Indian lands.

I have been informed by both Terry Brazell of the Water Resources Control Board and Matt Small of the U.S. Environmental Protection Agency's Region 9 that the EPA, rather than the Water Resources Control Board, regulates underground storage tanks on Indian property. Since the state does not require the owners of underground storage tanks located on Indian lands to obtain permits for the tanks, it follows that such owners are not required to pay the fee imposed by Health and Safety Code Section 25299.41. This result is consistent with my review of relevant federal cases.

Generally, states are precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it (Bryan v. Itaska County (1976) 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710, California v. Cabazon Band of Mission Indians (1987) 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244). Respect for the long tradition of tribal sovereignty and self-government underlies the rule that state jurisdiction over Indians in Indian country will not be implied easily.

In 1953, Congress enacted Public Law 280 (Title 28 U.S.C. Section 1360), which gives six states, including California, jurisdiction over civil causes of action involving Indians which arise in Indian lands to the same extent as those states have jurisdiction over other civil causes of action. Public Law 280 also provides that the states' civil laws of general application to private persons or property have the same force and effect within Indian country as they have elsewhere in the state.

In Bryan v. Itasca County, supra, the U.S. Supreme Court rejected the argument that, in Public Law 280, Congress granted the listed states general civil regulatory authority over Indian property. The Court held that the primary purpose of Public Law 280 was to grant the states jurisdiction over private civil litigation involving reservation Indians in state court. The law also gave the states broad criminal jurisdiction over offenses committed by or against Indians within Indian country in the states. However, the Court held that Public Law 280 did not grant the states general civil regulatory authority over Indian lands or the power to tax reservation Indians.

State law may be applied to Indian land when the conduct of non-Indians is involved, unless such application would impair a right granted or reserved by federal law or would infringe on the right of reservation Indians to make their own laws and be ruled by them (Segundo v. City of Rancho Mirage (9th Cir. 1987) 813 F.2d 1387). In Segundo, members of the Agua Caliente Band of Cahuilla Indians argued that the city could not apply rent control ordinances to a mobile home park operated by a non-Indian entity on Indian land. The court agreed, noting that the trend has been to rely on federal preemption of state regulation, using notions of Indian self-government as a backdrop against which assertions of state regulatory authority must be assessed. The court found that the comprehensive federal regulatory scheme covering the leasing of Indian lands preempted the application of state and local laws to the mobile home park.

In The People ex rel Department of Transportation v. Naegele Outdoor Advertising Co. of California (1985) 38 Cal.3d 509, the court held that California could not regulate billboards on Indian reservations. The court found that there was no clear expression of Congressional intent that the state be allowed to regulate such billboards and, in addition, the state's regulatory program was preempted by the operation of the federal Highway Beautification Act.

While no federal cases address the application of state underground storage tank regulatory programs to tanks located on Indian lands, State of Washington, Department of Ecology v. U.S. Environmental Protection Agency, (9th Cir. 1985) 752 F.2d 1465, involved the application of a state hazardous waste regulatory program to Indian property. In that case, Washington sought to apply its state hazardous waste regulations to the activities of all persons, Indian and non-Indian, on Indian lands. The U.S. EPA approved the state's application for interim authorization to administer the federal hazardous waste regulatory program in the state, except as to the Indian lands. The EPA argued that the Resource Conservation and Recovery Act (Title 42 U.S.C. Section 6901, et.seq.) applied to Indians, and that state regulation of hazardous waste activities on Indian property was preempted.

The court agreed, holding that RCRA does not authorize the states to regulate Indians on Indian lands. The court found that Congress had not clearly expressed an intention to permit such state regulation, and that there was a long-standing tradition of tribal sovereignty, as well as a federal policy of encouraging tribal self-government in environmental affairs. The court reached this result even though Indian tribes were clearly regulated under RCRA, and RCRA authorized the state to regulate hazardous waste activities in lieu of the federal program.

Based on the cases described above, the position taken by the EPA and the Water Resources Control Board appears to be correct; that is, the state does not have the authority to regulate underground storage tanks located on Indian property, whether they are operated by Indians or non-Indians. The operation of such underground storage tanks is regulated by the federal government (see Title 42 U.S.C. Section 6991, et.seq.). While the state may, under certain conditions, carry out corrective actions and enforcement activities under a cooperative agreement with the federal government, State of Washington Dept. of Ecology v. U.S.E.P.A., *supra*, held that such a provision involving the administration of hazardous waste laws does not give the state authority to regulate Indian lands.

Given the lack of a clear grant of authority from Congress, as well as the broad federal regulatory program in Title 42, I conclude that the state is preempted from regulating underground storage tanks located on Indian land, whether they are operated by Indians or non-Indians. Since the

Dennis P. Maciel

-4-

December 17, 1992

tanks are not permitted or otherwise regulated by the state, the Underground Storage Tank Fee does not apply to them.

Matt Small of the EPA noted that it is possible for Indians to agree to be subject to a state's regulatory authority by entering into a three-party agreement with the state and the EPA. He was aware of one New Mexico tribe that entered into such an agreement so that it could pay an underground storage tank fee and participate in the benefits of the program.

Please let me know if you have any questions, or if I can be of further assistance.

JV:wk
indian.ust

Janet Vining
10h

cc: Mr. E. V. Anderson
Ms. Margaret Solis
Mr. Larry Augusta